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In the Supreme Court of the United States

OCTOBER TERM, 1979

PALUMBO EXCAVATING CO.,
THOS. H. MADDEN CO.,
J. M. CORBETT CO.,

Petitioners,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RAYMOND J. SMITH
Suite 615—Monadnock Building
53 West Jackson Boulevard
Chicago, Illinois 60604

Attorney for Petitioners

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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To The Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Palumbo Excavating Co., Thos. H. Madden Co., and J. M. Corbett Co., pray that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the convictions of the petitioners.

JUDGMENT AND OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit in the above-entitled cause, dated May 18, 1979, affirmed the judgment of conviction. The opinion of the Court of Appeals is reprinted as Appendix A *infra*. The Judgment Order of the Court of Appeals was entered on that same date, May 18, 1979, and is reprinted as Appendix B *infra*. A Petition for Rehearing En Banc was timely filed but was denied by an Order dated June 26, 1979, which Order is reprinted as Appendix C *infra*.

JURISDICTION

The jurisdiction of this Court is invoked, pursuant to Title 28 U.S.C., §§ 1254(1) and 1291 and Rule 22(2) of the Rules of this Court.

STATEMENT OF THE CASE

The three corporate defendants were convicted after a jury trial of one count of conspiracy to violate the Sherman Act (15 U.S.C., §1) and 37 counts of mail fraud (18 U.S.C., §1341).

Fines were imposed only on the Sherman Act conspiracy violation (Count I) in the amounts of $100,000 as to J. M. Corbett Co., $150,000 as to Thos. H. Madden Co., and $200,000 as to Palumbo Excavating Co.

QUESTIONS PRESENTED

1. Whether the principles enunciated in *United States* v. *United States Gypsum*, ... U.S. ....., 98 S.Ct. 2864 (1978), 57 L.Ed.2d 854 (1978) are violated when in a felony Sherman Act case the trial court gives a general intent instruction that ". . . deemed [the parties] to have intended the necessary and direct consequences of their acts."

2. Is the due process requirement of the Fifth Amendment subverted when the majority stock owners of family-owned corporations are compelled to testify under Title 18 U.S.C. §6002 and that testimony is used in a criminal case to convict those corporations?

STATUTE INVOLVED

"§6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrmination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order. Added Pub.L 91-452, Title II, §201(a), Oct. 15, 1970, 84 Stat. 927."

REASONS FOR GRANTING THE WRIT

I.

THE PRINCIPLES ENUNCIATED IN UNITED STATES V. UNITED STATES GYPSUM, ... U.S. ....., 98 S.CT. 2864 (1978), 57 L.ED.2D 584 (1978) ARE VIOLATED WHEN IN A FELONY SHERMAN ACT CASE THE TRIAL COURT GIVES A GENERAL INTENT INSTRUCTION THAT ". . . DEEMED [THE PARTIES] TO HAVE INTENDED THE NECESSARY AND DIRECT CONSEQUENCES OF THEIR ACTS.

The fines levied against the petitioners were imposed based only on the Sherman Act count (Count I).

The trial court's instructions regarding intent were set out in the opinion below (App. A., pp. 5-6). Over the objection of the Defendants the trial court instructed the jury as to the Sherman Act count that:

> "It is not necessary to find a specific intent to violate the law, for the parties are deemed to have intended the necessary and direct consequences of their acts."

Th trial court, therefore, gave a general intent instruction in a felony Sherman Act case. This Court, in *United States* v. *United States Gypsum*, ... U.S. ....., 98 S.Ct. 2864 (1978), 57 L.Ed.2d 854 (1978), set out the minimum intent requirement that raises the conscious behavior of a defendant in a Sherman Act anti-trust case to the level of conduct which the law prohibits and which "is a fitting object of criminal punishment." 57 L.Ed.2d 854 at 875.

This Court, in defining the requisite elements of intent in a Sherman Act case, stated:

> "Where carefully planned and calculated conduct is being scrutinized in the context of a criminal prosecution, the perpetrator's *knowledge of the anticipated consequences is a sufficient predictate for a finding of criminal intent.*" (emphasis added)

The opinion of the Court below overlooks the fact that *Gypsum* mandates that the jury must be instructed that in order to convict, the jury must find that the defendant possessed this stated intent. The jury must also be instructed that they are to be the sole triers of the facts on the issue of whether or not this defined intent has been established. *Gypsum,* 57 L.Ed.2d 875. Certainly, under the holding in *Gypsum,* a trial court cannot give a general intent instruction in a Sherman Act felony case.

The offending jury instruction here eliminated the intent requirements in *Gypsum* and did not give a definition of the elements of intent in any way similar to the *Gypsum* requirement.

The instruction told the jury that they need only find a general intent and that the jury should "deem" and thus presume the defendants intended the necessary and direct consequences of their acts. The offending instruction was the sole guidance the jury had on the question of intent. Not only did the trial court fail to give a standard for the determination of intent as required by *Gypsum,* but invaded the province of the jury by "deeming" the intention of the defendants.

In *United States* v. *Smith,* 467 F.2d 1126 (7th Cir., 1972), where the charge was that of making an obscene radio communication, the court held as erroneously insufficient what the court interpreted as a general intent instruction, to wit:

> "The defendant may be found guilty if you find that the defendant was forbidden to do the act charged in the indictment and that he intentionally committed the act."

The court held in *Smith* that at least the jury must be instructed that "the defendant knew or reasonably should have known that he was committing a public wrong."

ALI Model Penal Code, Section 202, Comment (Tent) Draft No. 5, 1955, states:

> "We can see no virtue in preserving the concept of 'general intent' which has been an abiding ambiguity and confusion in the penal law."

The Model Penal Code, this court recently observed, has been one source of guidance upon which the court has relied to illuminate questions such as the appropriate standard of intent. *Gypsum*, 98 S.Ct. 2864, 2877 (1978).

When the jury was instructed that the defendants were deemed to have intended the necessary and direct consequences of their acts, the error was compounded. *United States* v. *Barash*, 365 F.2d 395 (2nd Cir., 1966) reversed the conviction on a charge of bribery of an IRS official where the trial court, in instructing on intent, used the much less offensive language that the jury could infer that the defendant intended the natural consequences of his acts. The court in *Barash* cited *Block* v. *United States*, 221 F.2d 786 (9th Cir., 1955); *Mann* v. *United States*, 319 F.2d 404 (5th Cir., 1963).

The giving of this offending instruction on intent over the objection of the petitioners constitutes error in this case.

II.

THE DUE PROCESS REQUIREMENTS OF THE FIFTH AMENDMENT IS SUBVERTED WHEN THE MAJORITY STOCK OWNERS OF FAMILY-OWNED CORPORATIONS ARE COMPELLED TO TESTIFY UNDER TITLE 18 U.S.C. §6002 AND THAT TESTIMONY IS USED IN A CRIMINAL CASE TO CONVICT THOSE CORPORATIONS.

18 U.S.C. provides that in pertinent part ". . . no testimony or other information compelled under the [immunity] order . . . may be used against the witness in any criminal case. . . ." The testimony of Palumbo and Madden was compelled by use of Title 18 U.S.C. §6002. Their lengthy testimony concerning all the facts involved in the case was critical and substantially contributed to the convictions of their corporations.

Looking to the true relationship between them and their companies we submit that section 6002 means that their rights were violated when the compelled testimony was used to convict and fine their companies. While the legislative history of section 6002 is silent in this regard, the procedure employed herein, we submit, amounts to the "use" against Palumbo and Madden of their testimony "in any criminal case." As the defendant company is indistinguishable from the individual who heads it, the individual's testimony was improperly admitted against it.

Mr. Robert Madden is the owner of 95% of the Thos. M. Madden Co. and is its chief managing officer. Mr. Peter Palumbo is the owner of 50% of Palumbo Excavating Co. stock, as well as the company's chief managing officer. All the remaining portions of the stock of these companies are family-owned. Madden and Palumbo are the alter egos of their companies. At the time of the grand jury investi-

gation, Robert Madden and Peter Palumbo were subpoenaed as witnesses. They exercised their Constitutional rights under the Fifth Amendment and were then given immunity under Title 18, §6002. At the time of the trial, the government subpoenaed these two witnesses to testify on behalf of the government. Madden and Palumbo again exercised their rights under the Fifth Amendment. The government obtained immunity for these two men under Title 18, §6002, which compelled their testimony at the trial. Objections were made to their testimony based on the fact that their testimony was being used against them in a criminal case.

Both the Palumbo and Madden companies are closely held, and thus subject to the unique doctrines applicable to this class of entity. See *Galler* v. *Galler,* 38 Ill.2d 16, 203 N.E.2d 577 (1964); *Brooks* v. *Willcuts,* 78 F.2d 270, 273 (8th Cir., 1935). The Illinois Supreme Court there defined a close corporation as one in which the stock was held in a few hands, or in a few families, and was seldom, if ever, purchased or sold. Thus, the petitioners' companies are closely-held corporations.

The Illinois Supreme Court examined the theoretical differences between a public and a closely-held corporation and the effect of these differences. First, the Court recognized that because of the makeup of the closely-held corporation, the investor will have a great interest in the company's direction because of his inability to dispose freely of the shares. *Galler* v. *Galler,* 32 Ill.2d 16, 203 N.E.2d 577 at 583-584 (1964). Second, the fact that owners of a close corporation are most often also its directors and officers evidences the fact that its policies are influenced *wholly* by the owner's personal feelings. Hence, the Court wrote, judicial treatment of a closely-held corporation should be *sui generis.* Any attempt to hold

such an entity strictly to the rules governing corporations generally would be useless, elevating form over substance. *Galler* v. *Galler,* 32 Ill.2d 16, 203 N.E.2d 577, 584.

The instant case must first be distinguished from the situation involving the typical officer of a publicly-held corporation who may own an insubstantial number of the company's shares. The situation here is that the witness and the company were indistinguishable as a practical matter. To ignore the fact that Palumbo's and Madden's testimony was not used against *them* in a criminal case is to ignore reality. They will pay the fines and the companies that bear their names are branded with felony convictions.

The opinion of the Court below would dispose of this issue by merely saying that the petitioners cited no authority to support the defendants' position. To counsel's knowledge, the Anti-trust Division has never before compelled the testimony of a majority stockholder of a family's corporation and then used that testimony in a criminal case against that family corporation. This type of an extension of use immunity would be an overwhelmingly powerful, yet constitutionally objectionable, weapon in the arsenal of the government against its citizens.

CONCLUSION

For the above stated reasons, the petitioners respectfully request that the Court grant the Writ of Certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted,

RAYMOND J. SMITH,

Attorney for the Petitioners